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No.

In The

Supreme Court of the United States

October Term, 1987

THE PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.; and DOMINICK EVANGELISTA, individually and as President of the Port Authority Police Benevolent Association, Inc.,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent,

Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella and George Albin (Intervenors).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Citations ii

Reasons for Denying the Writ:

I. There is no conflict with the decisions of this Court. 2

II. There is no conflict with Third Circuit precedents. 5

III. There is no conflict with other courts. 6

Conclusion 7

TABLE OF CITATIONS

Cases Cited:

Blake v. Kline, 612 F.2d 718 (1979) 5

Jacintoport Corp. v. Greater Baton Rouge Port Commission, 762 F.2d 435 (5th Cir. 1985)..... 7

Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 59 L. Ed. 401, 99 S. Ct. 1171 (1979) 2, 3, 4, 7

Mineo v. Port Authority of New York and New Jersey, 779 F.2d 939 (3rd Cir. 1985), rehearing and rehearing en banc denied, 783 F.2d 42 (3rd Cir. 1986); cert. denied, 54 U.S.L.W. 3859 (1986).....5, 6

Contents

Page

Monell v. New York City Department of Social Services, 436 U.S. 658, 56 L. Ed. 611, 98 S. Ct. 2018 (1978) 2

Raysor v. Port Authority of New York and New Jersey, 768 F.2d 34 (2d Cir. 1985) 6

Statutes Cited:

42 U.S.C. § 1983 2

N.J.S.A. 32:1-16 4

N.J.S.A. 32:1-35.74 3

N.Y. Unconsol. Laws § 6416 (McKinney 1979) 4

N.Y. Unconsol. Laws § 7101 (McKinney 1979) 6

N.Y. Unconsol. Laws § 7105 (McKinney 1979) 6

United States Constitution Cited:

Tenth Amendment 5

Eleventh Amendment 2, 3, 4, 5, 6, 7

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

To the Honorable, The Justices of the Supreme Court of the United States of America:

Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella and George Albin, the respondent-intervenors, by their attorneys, Leeds & Morelli, file this brief in opposition to the petition for writ of certiorari and present the following:

REASONS FOR DENYING THE WRIT

I.

There is no conflict with the decisions of this Court.

Petitioner claims that the decision below is in conflict with *Monell v. New York City Department of Social Services,* 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). In *Monell,* the Court held that the word "person" as used in 42 U.S.C. § 1983, included "local government bodies," which could be sued under the Civil Rights Act.

However, the Court of Appeals directly addressed the issue of whether the Port Authority of New York and New Jersey was considered a local government body, and found that it was not. The Third Circuit, followed the Court's reasoning set forth in *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979). In *Lake Country Estates, supra,* the Court "granted certiorari to decide whether the Tahoe Regional Planning Agency, an entity created by compact between California and Nevada, is entitled to the immunity that the Eleventh Amendment provides to the compacting States themselves" 440 U.S. at 393.

The Court specifically addressed the issue of whether

California and Nevada in creating the Tahoe Regional Planning Agency (RPA), had created a state agency or a political subdivisional and thus, entitled to Eleventh Amendment immunity. The Court set forth several factors which it used as a guide to aid in its determination.

Using the several factors outlined in *Lake Country Estates, supra,* the Third Circuit found that the Port Authority of New York and New Jersey was an arm of the compacting states rather than a body "comparable to a county or municipality," within the meaning of *Lake Country Estates, supra,* 440 U.S. at 401. Thus, the Port Authority is entitled to Eleventh Amendment immunity.

The petitioner would have the Court believe that since the Court in *Lake Country Estates, supra,* found that the Tahoe Regional Planning Agency was charged with the creation and implementation of a master plan for the geographic area under its control and that allegedly, the Port Authority is also authorized to prepare and implement a master plan for the development of the Port District (N.J.S.A. 32:1-35.74), the Port Authority should be characterized as "local governing body" because the Tahoe Regional Planning Agency was considered a local governing body.

However, what the RPA was authorized to accomplish is not the factor that led the Court to conclude that it was a local government body. Indeed, petitioner readily concedes that the Port Authority and the Tahoe Regional Planning Agency are quite distinguishable (Petitioner's Brief, p. 9). As the Third Circuit stated,

> [T]he fatal aspect of the RPA's funding structure was the fact that it received its funding from its participating county governments rather than the state governments. See 440 U.S. at 402. This fact,

> together with the other significant characteristics of the RPA, indicated that it was a creature of the countries rather than the states, and thus would not enjoy Eleventh Amendment immunity.

(Petitioner's Brief, Appendix A, p. 7).

However in the instant case, if the Port Authority did need financial support, that support would be provided by the states. Contrary to the petitioner's assertion, the Third Circuit, did not misquote Compact Article XV (N.J.S.A. 32:1-16) and its purpose. The court had previously set out Compact Article XV in its opinion (Petitioner's Brief, Appendix A, pp. 6-7). It is clear that the court was well aware of the contents of the provision and its meaning. Thus, the fact that the court did not set out Article XV in full again, is without consequence.

Therefore, it is clear the Authority would be able to proceed to the state legislatures in order to recoup the amount needed for its operating expenses. *See* N.J. Stat. Ann. 32:1-16 (West 1963); N.Y. Unconsol. Laws § 6416 (McKinney 1979) (Compact Article XV) ("Unless . . . the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate [the amount needed]."") (Petitioner's Brief, Appendix A, p. 8).

The Third Circuit went through each of the factors the Court used in *Lake Country Estates, supra,* to decide whether an entity created by interstate compact was an arm of the state and thus entitled to Eleventh Amendment immunity. Thus, as the principles set forth in *Lake Country Estates, supra,* were followed by the Third Circuit in the instant matter and it was merely the facts that distinguish the outcome of the two cases, there is no reason to reargue it.

II.

There is no conflict with Third Circuit precedents.

The present decision is fully in accord with the only other decision by the Court of Appeals for the Third Circuit in which the issue of Eleventh Amendment immunity was in dispute.

The petitioner asserts that the present decision is somehow in conflict with the Third Circuit's decision in *Blake v. Kline,* 612 F.2d 718 (1979), in which the matter of Eleventh Amendment immunity was at issue. However, petitioner's contention is wholly without merit. The Court of Appeals explicitly states in its opinion that it used the factors outlined in *Blake v. Kline, supra,* as a guide in determining that the Port Authority is protected by Eleventh Amendment immunity. Indeed, the Third Circuit discusses, at length, the factors set forth in *Blake v. Kline, supra* (Petitioner's Brief, Appendix A, p. 10). Thus it is clear that the Court of Appeals in this case followed *Blake v. Kline, supra*, and there is no conflict in the Third Circuit.

Furthermore, petitioner's reasoning is in direct contradiction to the Third Circuit's prior holding in *Mineo v. Port Authority of New York and New Jersey,* 779 F.2d 939 (3d Cir. 1985), *rehearing and rehearing en banc denied,* 783 F.2d 42 (3rd Cir. 1986); *cert denied,* 54 U.S.L.W. 3859 (1986), which ruled that the Port Authority was a "State" for the purposes of Tenth Amendment immunity, using the Eleventh Amendment immunity test laid out by the Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra.* If the Third Circuit, in applying an Eleventh Amendment test, and after reviewing Eleventh Amendment cases, made the determination that there was Tenth Amendment immunity, it certainly follows that there is Eleventh Amendment immunity as well. In fact, the Third Circuit went as far as to pronounce the Port Authority "an entity run as an

independent State agency with little or no supervision by the federal government." *Mineo v. Port Authority of New York and New Jersey, supra*, at 949 (emphasis added). As a state agency, the Port Authority is entitled to Eleventh Amendment immunity. Hence, the petitioner has not shown a conflict within the Third Circuit and there is no reason to reargue the issue.

III.

There is no conflict with other courts.

Contrary to petitioner's views, the Second Circuit's decision in *Raysor v. Port Authority of New York and New Jersey*, 768 F.2d 34 (2d Cir. 1985) is not in conflict with the Third Circuit in the instant matter. *Raysor, supra,* involved matters wherein the Port Authority had consented to suit and was thus not immune from suit. N.Y. Unconsol. Laws § 7101 (McKinney 1979). However, the instant matter involves an action for injunctive relief against the Port Authority. The Port Authority of New York and New Jersey has consented to suits against it, but the consent does not extend to suits seeking to enjoin Port Authority action. N.Y. Unconsol. Laws § 7105 (McKinney 1979). Specifically, N.Y. Unconsol. Laws § 7105 (McKinney 1979) states:

> [T]he foregoing consent does not extend to suits, actions or proceedings for judgments, orders or decrees restraining, enjoining or preventing the port authority from committing or continuing to commit any act or acts, other than suits, actions or proceedings by the attorney general of New York or by the attorney general of New Jersey . . . .

The petitioner also asserts that the Third Circuit Court of Appeals is in conflict with the Fifth's Circuit decision in

Jacintoport Corp. v. Greater Baton Rouge Port Commission, 762 F.2d 435 (5th Cir. 1985). This assertion is wholly without merit. In fact, the court in *Jacintoport, supra,* explicitly states that it used the test of the Third Circuit as a guide to determine that the Greater Baton Rouge Port Commission did not merit Eleventh Amendment immunity. 765 F.2d 435, 437 (5th Cir. 1985). Therefore, to suggest that *Jacintoport Corp., supra,* is somehow in conflict with the Third Circuit in the instant action is simply ludicrous.

Similarly, the petitioner presents arguments that there is conflict in the district courts. However this is not the case. Both cases cited by the petitioner were decided before the Court decided *Lake Country Estates, supra. Lake Country Estates, supra,* clearly sets forth the test to be used in determining whether an entity created by interstate compact was an arm of the compacting states, rather than a body "comparable to a county or municipality." 440 U.S. at 401. The present decision is fully in accord with *Lake County Estates* and therefore, there is no reason to reargue it.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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